United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

459

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 23,269

UNITED STATES OF AMERICA

v.

ERNEST E. SIMPSON, Appellant

Appeal from the United States District Court
for the District of Columbia

WILLIAM J. FITZGERALD
421 Shoreham Building
Washington, D.C. 20005
Counsel for Appellant
(Appointed by this Court)

I N D E X

This case was not previously before this Court, however it has been consolidated for appeal with Appeal No. 23,270, Williams v. United States, since appellants were co-defendants at the trial in the District Court.

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TABLE OF AUTHORITIES

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*Cases chiefly relied upon.

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BRIEF FOR APPELLANT

ISSUES PRESENTED FOR REVIEW

1. Appellant contends that the jury verdicts of guilty of burglary in the second degree and not guilty of grand larceny are irreconcilable on the facts of this case, where the testimony as to each of these alleged offenses came from only one witness and was based on that witness's observations of continuous activity during a period of only five or six minutes (Tr. 50). The issue is

whether or not inconsistent verdicts from identical evidence compel a reversal of the conviction.

2. Appellant submits that the trial court abused its discretion in allowing the introduction into evidence the fact that he had been convicted of robbery in 1962 (Tr. 73-79, 157) in order to impeach his testimony in his own behalf.

3. Appellant presents the same issue as that raised by his co-defendant in appeal No. 23,270, Williams v. United States, namely that the giving of an "Allen" type charge in initial instructions to the jury was prejudicial to the appellant because it unfairly coerced each juror away from his own individual opinion in order to acquiesce in the opinion of any potential majority. (Tr. 202, 203).

REFERENCES TO RULINGS

On the issue of abuse of discretion counsel refers to the trial court's stated ruling at pages 73 through 79 of the transcript.

The "Allen" charge given by the trial court is found at pages 202 and 203 of the transcript.

STATEMENT OF THE CASE

Appellant was indicted in two counts charging him with burglary in the second degree and grand larceny in connection with certain events which took place on March 18, 1968. The agreed facts are that around 3:00 p.m. on that day appellant and his co-defendant in the court below, one Clarence E. Williams, spent a few moments near the doorway of Castleberg's Jewelry Store at 1004 F Street, N.W. in the District of Columbia. While they were there, an unidentified

third person, known only as a man in an orange suede coat, was also present. Police Officer James Williams observed the three individuals in that vicinity for five or six minutes and then attempted to arrest all three, however the third man ran and escaped. The officer then discovered that a piece of glass had been removed from the showcase window of the jewelry store and that some ring cases on display were in a state of disarray. He found a piece of glass in the entrance area which matched the hole in the window and he also found a wire hook. He was advised by the store manager at that time that four rings were missing from the display and that their total value was $2,172.78. No rings or any stolen property were found on the person of either defendant or in the immediate area.

The testimony supporting the conviction is solely that of Officer Williams wherein he stated that he saw the third man press against the showcase window, saw his hand moving back and forth apparently manipulating an instrument in and out of the window, saw this appellant catch two objects pulled from the window and place one of them in the third man's pocket and another in his hand, and, after he arrested the two defendants, found the wire hook which he stated he saw the third man manipulating inside the store window (Tr. 33-35, 37, 38).

No other witness testified to any activity on the part of either defendant which could implicate them in any crime. Both defendants testified that they did not know this third man and had not been aware of what he had been doing until after they were placed under arrest.

The jury found appellant guilty of burglary in the second degree but not guilty of grand larceny.

ARGUMENT

I. The Inherent Inconsistency In The Verdicts Returned By The Jury, From The Evidence In This Particular Case, Compels A Reversal Of The Verdict Of Guilty Of Burglary In The Second Degree.

Factually, the only question for the jury to resolve was whether or not to accept the testimony of Officer Williams as to what he observed. He gives only one line of testimony to prove the requisite element of entry required to convict on burglary in the second degree, and that appears at page 38 of the transcript where he states he did see the wire hook "through the hole in the showcase window." There was no other entry of any kind by any person or any instrument.

Thus in order to convict appellant on the burglary count, the jury was required to find him guilty of aiding and abetting the third man either by standing as a lookout or positioning himself so as to hide the third man's activities from the view of passers-by. Similarly on the larceny count, the jury had only Officer Williams' testimony about the aiding and abetting activities of the appellant in catching rings and placing them in the third man's possession. The entire operation took place in five or six minutes according to the officer. Yet by their verdict the jury expressly found that appellant performed no act in furtherance of the larceny which undeniably occurred at that time. The officer's testimony was rejected. How then could appellant have performed any act in furtherance of the immediately antecedent burglary?

The legal effect of the foregoing is that the Court must find that the evidence failed to establish the facts necessary to convict on the charge of grand larceny and, after eliminating from consideration the evidence adduced in

support of those facts, turn to the question of whether there is any other evidence sufficient to sustain the conviction of burglary in the second degree. In this case there is no other evidence of any kind, and the conviction must fall.

The cases dealing with the effect of inconsistent verdicts have been most recently collected and analyzed in the annotation at 16 ALR 3d 866. It is duly noted therein at page 869 that "Some courts have taken the view that when the verdicts returned respecting two or more indictments or informations tried jointly are incapable of logical reconciliation, they cannot be sustained." Analysis of cases cited for the opposite view, that inconsistency in verdicts is no bar to a conviction, shows that in the vast majority of those cases the courts went to great lengths to show that the verdicts weren't really inconsistent or totally irreconcilable in logic. That approach is quite salutary and appellant does not challenge it, but he advocates as strenuously as possible that the better reasoned jurisprudence of criminal law will not allow two truly repugnant and irreconcilable verdicts, based on identical evidence, to stand.

The leading Supreme Court case most often cited on this point reflects the exact approach now urged by appellant. Dunn v. United States, 284 U.S. 390, 76 L. Ed. 356, 52 S. Ct. 189 (1932) involved three charges of violations of the prohibition laws. The first charge was maintaining a nuisance, the second unlawful possession of liquor, and the third unlawful sale of same. The jury convicted on the first charge but acquitted on the second and third. Although the conviction was affirmed in general terms, the Court was careful to note that it felt the verdicts were not irreconcilable because of the physical absence of the defendant at the time of the making of the raid which produced the evidence. Appellant would urge to this Court, however, the reasoning of Justice Butler's

dissent based on the fact that he cannot reconcile the three verdicts. He held that the acquittal on count two negatived any unlawful possession of liquor by the defendant, consequently nothing remained to support a finding of guilty under the first count. He states:

> " . . . In criminal cases no form of verdict will be good which creates a repugnancy or absurdity in the conviction. . . .
> Where there is a verdict of not guilty on one count and a verdict of guilty on another and the former necessarily determines that the evidence failed to establish a fact which is an essential ingredient of the offense charged in the other count, then in determining whether the evidence was sufficient to sustain the finding of guilt the court must exclude from condideration the fact so found in favor of the accused. And so in every such case the question of law for the court always is whether, outside the fact eliminated by the verdict of not guilty, the evidence was sufficient to warrant the conviction." (Authorities cited.) 284 U.S. at 400, 401.

The key, of course, is that the same evidence must form the basis for the contrary findings. The rule has been adopted without question in Georgia. See Finch v. State, 87 Ga. App. 426, 74 S.E. 2d 121 (1953) and Davis V. State, 43 Ga. App. 122, 157 S.E. 888 (1931)). The Fifth Circuit noted in the case of Hughes v. United States, 95 F.2d 538, 5th Cir. (1958) that: "It may be conceded that if the same offense is charged in two counts of an indictment or two indictments concolidated for trial, acquittal on one count will bar conviction on the other. But in considering this question the test of identity is whether the same evidence will support both counts." The Court went on to distinguish between the type and quantity of evidence needed to prove an overt criminal act and conspiracy to perform that act, and consequently reconciled the verdicts because the same evidence couldn't support both charges. It is clear, however, that the Court was prepared to reverse the conviction if it had been unable to make this distinction.

Thus the conditions for applying the principle are quite sharply drawn, and the conditions must be met before a defendant can avail himself of the benefit of inconsistent verdicts. Once they are met, however, the Court should not hesitate. In People v. Chambers, 22 Cal. App. 2d 687, 72 P.2d 746 (1937) it was stated: "The effect of conflicting irreconcilable verdicts which were rendered in this case, however, compels us to reverse the judgment. There is no escape from that conclusion." 72 P.2d at 763. Defendants were acquitted of resorting to written or spoken language or personal conduct to advocate, teach, aid or abet criminal syndicalism. Identical evidence was used to prove other activities relating to advocating those principles and that conviction was reversed. Again, the key was identical evidence. The California court further held a new trial was not proper because the jury's determination of acquittal barred the use of that evidence for another charge.

In the case at bar, the only evidence is the testimony of one witness. The jury has rejected his claimed observation of appellant's assistance in the theft of the rings. The physical facts and time sequence leave no evidence of any participation in the burglary.

II. Admission Of A Prior Conviction For Robbery In 1962 Was An Abuse Of The Discretion Vested In The Court By The Luck Case.

In a series of cases, primarily Luck v. United States, 121 App. D.C. 151, 348 F.2d 763 (1965); Gordon v. United States, 127 App. D.C. 343, 383 F.2d 936 (1967); and Evans v. United States, 130 App. D.C. 114, 397 F.2d 675 (1968) this Court has ruled that the trial court has discretion to bar the use of some, or all, of a defendant's prior convictions for impeachment purposes if the defendant elects to testify in his own behalf. The predominant factor is the

search for truth, which necessarily involves an evaluation of both the need for defendant's own testimony and the possible prejudicial effects on that testimony of the introduction of evidence of prior convictions.

The need for the testimony of both defendants is beyond question here and was ably presented by trial counsel. (Tr. 75,76) Defendants had absolutely no other witnesses whatsoever. Their contention that they were victims of circumstance had to be placed before the jury, otherwise the police officer's testimony would stand uncontradicted. Failure to testify in this case would have been tantamount to entering a guilty plea.

This trial took place in April of 1969, yet the government was permitted to show that appellant had been convicted of robbery in 1962. In Gordon this Court stated: "The nearness or remoteness of the prior conviction is also a factor of no small importance." 127 App. D.C. at 347. The greater likelihood of prejudice is also noted when the prior conviction was for "substantially the same conduct for which the accused is on trial." Id. Here a seven year old robbery conviction was used to impeach in a case turning solely on credibility and the charges were burglary and larceny. The "If he did it before, he'll do it again" reflex seems inescapable and should have been avoided by the discretionary exclusion of this evidence. Appellant was substantially prejudiced by its admission into evidence, the Court's instructions notwithstanding.

III. The Court's Giving Of A Type Of "Allen" Charge In Its Initial Instruction Was So Coercive As To Taint The Jury's Deliberations.

This appellant is aware that this same point has been raised on appeal by his co-defendant, Clarence E. Williams, in Appeal No. 23,270, which has been

onsolidated with this one. Points and authorities cited in that brief are also dopted herein.

The gravamen of the error, as this appellant sees it, is the giving of the harge at the outset which certainly starts the jurors thinking in terms of ajority and minority views right at the beginning of their deliberations. Surely t places a stigma on being in the minority, and it affords no encouragement to ach juror to rely on his own judgment.

Appellant will not belabor the familiar criticisms of even a supplemental Allen" charge, such as appears in Green v. United States, 309 F.2d 852, 5th Cir. 1962), but would urge to this Court that in this jurisdiction approval of "Allen" ype charges has always been linked to a reminder that jurors ". . . should not cquiesce in a verdict which does not represent their own convictions." Fulwood v. nited States, 125 App. D.C. 183, 369 F.2d 960 (1966). No such reminder was ncluded by the trial court in the instant case.

In considering the entire record of this case, it further seems highly kely that the charge objected to above was quite instrumental in producing the consistent verdicts discussed at Part I of this argument. The whole thrust is inexorably toward compromise of personal convictions that the irreconcilable rdicts seem an inevitable result.

CONCLUSION

Because the finding of acquittal on the grand larceny charge precludes the nsideration of evidence introduced in support of that charge to support the

burglary charge, appellant prays that the judgment of conviction of the burglary charge be reversed for insufficient evidence and that a judgment of acquittal of that charge be entered in his favor.

Alternatively appellant prays for reversal and remand for a new trial on the following grounds: Inherently inconsistent verdicts require this as a minimum corrective action; the trial court abused its discretion under Luck and unduly prejudiced appellant by admitting evidence of a seven year old robbery conviction to impeach appellant's testimony; and the charge to the jury was too coercive to allow for full and fair deliberation.

Respectfully submitted,

WILLIAM J. FITZGERALD

421 Shoreham Building
Washington, D.C. 20005

Counsel for Appellant
(Appointed by this Court)